(6) (6)

Nos. 85-954 and 85-955

Supreme Court, U.S.
FILED
FEB 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

MALCOLM BALDRIGE, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

Section 8(a) of the Fishermen's Protective Act of 1967 (the Pelly Amendment) provides that the Secretary of Commerce shall certify if the nationals of a foreign country "are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." 22 U.S.C. 1978(a). Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) provides, more specifically, that the Secretary of Commerce shall certify if the nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the International Convention for the Regulation of Whaling. 16 U.S.C. 1821(e)(2). The questions presented are:

1. Whether the Pelly and Packwood Amendments require the Secretary of Commerce automatically to certify Japan, an important foreign ally culturally and historically committed to whaling, which presently declines to follow certain international whale harvesting quotas but has entered into an agreement with the United States to drop its objections and terminate its commercial whaling activities by April 1, 1988.

2. Even if the Secretary of Commerce does have such a nondiscretionary duty to certify, whether the issuance of a writ of mandamus ordering certification is appropriate in the circumstances of this case.

PARTIES TO THE PROCEEDING

The petitioners in No. 84-955 are: Malcolm Baldrige, Secretary of Commerce; and George Shultz, Secretary of State. The respondents are:

American Cetacean Society;
Animal Protection Institute of America;
Animal Welfare Institute;
Center for Environmental Education;
The Fund for Animals;
Greenpeace U.S.A.;
The Humane Society of the United States;
International Fund for Animal Welfare;
The Whale Center;
Connecticut Cetacean Society;
Defenders of Wildlife;
Friends of the Earth;
Thomas Garrett;
Japan Whaling Association;
Japan Fisheries Association.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Introduction and summary of argument	10
Argument	15
I. The Pelly and Packwood Amendments do not require automatic certification in response to any departure from IWC whale harvesting quotas	15
A. The plain language of the Amendments vests the Secretary with discretion in determining whether a departure from IWC harvest quotas "diminishes the effectiveness" of the ICRW	16
B. The legislative history demonstrates that Congress intended the Secretary to exercise discretion in determining whether a departure from IWC harvest quotas "diminishes the effectiveness" of the ICRW	22
1. The 1962 Amendments to the Tuna Convention Act	22
2. The 1971 Pelly Amendment	24
3. The 1978 Amendment of the Pelly Amendment	30
4. The 1979 Packwood Amendment	33
5. The 1984 Eastern Pacific Tuna Licensing Act	39
C. Even if the plain language and legislative history were open to debate, this Court should defer to the Secretary's reasonable interpretation of the statutes	41

Argument—Continued: Page

II. The Court's use of mandamus was inappropriate in this case 46

Conclusion 50

Addendum I 1a

Addendum II 3a

Addendum III 4a

TABLE OF AUTHORITIES

Cases:

Adams v. *Vance*, 570 F.2d 950 45
American Tobacco Co. v. *Patterson*, 456 U.S. 63 37
Arkansas Electric Cooperative Corp. v. *Arkansas Public Service Comm'n*, 461 U.S. 375 40
Board of Governors v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986) 29, 37
Chemical Manufacturers Ass'n v. *NRDC*, No. 83-1013 (Feb. 27, 1985) 41
Chevron U.S.A. Inc. v. *NRDC*, No. 82-1005 (June 25, 1984) 41
Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 ..... 44, 48
Dalehite v. *United States*, 346 U.S. 15 18
Dames & Moore v. *Regan*, 453 U.S. 654 ..... 12, 20
Decatur v. *Paulding*, 39 U.S. (14 Pet.) 497 ..... 18, 19, 47
Federal Election Comm'n v. *National Conservative Political Action Committee*, No. 83-1032 (Mar. 1985) 47-48
Haig v. *Agee*, 453 U.S. 280 ..... 20, 44, 48
Harisiades v. *Shaughnessy*, 342 U.S. 580 ..... 14, 48
Heckler v. *Ringer*, No. 82-1772 (May 14, 1984) 47
Johnson v. *Eisentrager*, 339 U.S. 763 48-49
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 ..... 18, 47
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 50
Morrison-Knudsen Construction Co. v. *Director, OWCP*, 461 U.S. 624 33

Cases—Continued: Page

Moser v. *United States*, 341 U.S. 41 25
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 18
Oetjen v. *Central Leather Co.*, 246 U.S. 297 49
Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 48
Panama Canal Co. v. *Grace Line, Inc.*, 356 U.S. 309 ..... 19, 20, 47
Regan v. *Wald*, No. 83-436 (June 28, 1984) 14, 21, 36, 48
Sampson v. *Murray*, 415 U.S. 61 48
Sedima, S.P.R.L. v. *Imrex Co., Inc.*, No. 84-648 (July 1, 1985) 33
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 ..... 12, 20, 21, 42, 44
United States v. *Locke*, No. 83-1394 (Apr. 1, 1985) 29
United States v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985) 41
United States v. *S.A. Empressa de Viacao Aerea Rio Grandesne (Varig Airlines)*, No. 82-1349 (June 19, 1984) 18
United States ex rel. Girard Trust Co. v. *Helvering*, 301 U.S. 540 47
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 48
Weinberger v. *Rossi*, 456 U.S. 25 50
Whitehouse v. *Illinois Central R.R.*, 349 U.S. 366 48
Wilbur v. *United States ex rel. Kadrie*, 281 U.S. 206 47
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 20
Zemel v. *Rusk*, 381 U.S. 1 20

Treaties, statutes and regulations:

Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087 ..... 32, 45
Arts. II-IV, 27 U.S.T. 1092-1097 32
Art. XV, 27 U.S.T. 1110-1112 32
International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716 *et seq.* (entered into force Nov. 10, 1948) 3

Treaties, statutes and regulations—Continued: Page

Art. I, 62 Stat. 1717 ..... 3, 4
Art. III, 62 Stat. 1717-1718 ..... 4, 32
Art. V, 62 Stat. 1718-1719 32
Art. V, 62 Stat. 1718-1719 ..... 4, 20
Sched., 62 Stat. 1723-1727 4

Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. (Supp. II) 972 *et seq.* 22, 39

16 U.S.C. (Supp. II) 972c 39

Fishermen's Protective Act of 1967, 22 U.S.C. 1971 *et seq.* 2, 39

§ 8(a) (1), 22 U.S.C. 1978(a) (1) 2, 16, 17, 1a
§ 8(a) (2), 22 U.S.C. 1978(a) (2) 30
§ 8(a) (4), 22 U.S.C. 1978(a) (4) 2, 17, 1a
§ 8(h) (3), 22 U.S.C. 1978(h) (3) 16

Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* 2

§ 101, 16 U.S.C. 1811 2
§ 102, 16 U.S.C. 1812 2
§ 201, 16 U.S.C. 1821 2
§ 201(e) (1) (E), 16 U.S.C. 1821(e) (1) (E) 21
§ 201(e) (2), 16 U.S.C. 1821(e) (2) 2, 16, 33
§ 201(e) (2) (A), 16 U.S.C. 1821(e) (2) (A) 16, 1a
§ 201(e) (2) (A) (i), 16 U.S.C. 1821(e)(2)(A) (i) 18, 34, 1a
§ 201(e) (2) (B), 16 U.S.C. 1821(e) (2) (B) 17, 2a
§ 201(e) (2) (B)-(D), 16 U.S.C. 1821(e) (2) (2) (B)-(D) 19

Tuna Conventions Act, 16 U.S.C. 951 *et seq.* 22

16 U.S.C. 955(c) 22

Whaling Convention Act, 16 U.S.C. 916 *et seq.* 3

16 U.S.C. 916j 18
22 U.S.C. 2151n 50
28 U.S.C. 1361 ..... 14, 46
50 C.F.R. 281.5 24

Miscellaneous: **Page**

Commercial Fisheries: Hearings on H.R. 7117, et al. Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92 Cong., 1st Sess. (1971) 24-25, 26, 28

117 Cong. Rec. (1971):

pp. 34750-34754 26
p. 34751 26
p. 34752 ..... 26, 27, 28
p. 34753 26
p. 34754 26
pp. 47053-47054 26
p. 47054 26

125 Cong. Rec. (1979):

p. 8951 33
p. 8952 33
p. 16432 33
p. 21742 34
p. 21743 ..... 34, 35
p. 22082 34
pp. 22082-22083 ..... 34, 35
p. 22083 ..... 34, 36, 37
p. 22084 34

31 Fed. Reg. 16096 (1966) 24

Fish and Wildlife Miscellaneous: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. Pt. 1 (1979) 38

Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. (1979) 38

Fishery Legislation: Hearings on S. 1242, et al. Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) 24, 26, 27

H.R. Rep. 2409, 87th Cong., 2d Sess. (1962) 23

Miscellaneous—Continued: Page

H.R. Rep. 92-468, 92d Cong., 1st Sess. (1971) 24, 25, 26
H.R. Rep. 95-1029, 95th Cong., 2d Sess. (1978) 30, 31
H.R. Rep. 98-721, 98th Cong., 2d Sess. (1984) 40
Outlaw Whaling: Hearing on Whaling Operations Conducted Outside the Control of the International Whaling Commission Before the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 1st Sess. (1979) 36
2 Public Papers of the President (1979) 37
Report of the Scientific Committee (IWC 36/4) (May 26, 1984) 6, 3a
Restatement (Revised) of Foreign Relations Law of the United States Pt. III (Tent. Draft No. 1, 1980) 49
Review of the 33d International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 97th Cong., 1st Sess. (1981) 5
Review of the 34th International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. (1982) 5, 6
S. 917, 96th Cong., 1st Sess. (1979) 33
S. Exec. Rep. 98-13, 98th Cong., 1st Sess. (1983) 39
S. Exec. L, 92d Cong., 1st Sess. (1971) 49
S. Rep. 1737, 87th Cong., 2d Sess. (1962) 23, 24
S. Rep. 92-582, 92d Cong., 1st Sess. (1971) 25, 26
S. Rep. 96-72, 96th Cong., 1st Sess. (1979) 33
S. Treaty Doc. 98-3, 98th Cong., 1st Sess. (1983) .. 39, 40
Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 Ecology L.Q. 323 (1977) 3
Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law. 543 (1984) 3
U.S. Dep't of Commerce, *Annual Report 1984/85: Marine Mammal Protection Act of 1972* (June 1985) 43-44, 45

Miscellaneous—Continued: Page

U.S. Policy with Respect to the International Protection of Whales: Hearing and Mark-up on H.R. Con. Res. 54 Before the House Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations, 99th Cong., 1st Sess. (1985) 7, 8, 44

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a)[1] is reported at 768 F.2d 426. The opinion of the district court (Pet. App. 56a-84a) is reported at 604 F. Supp. 1398.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-91a) was entered on August 6, 1985. Petitions for rehearing were denied on October 11, 1985 (Pet. App. 92a-99a). Petitions for a writ of certiorari were filed on December 4, 1985 and were granted on January 13, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix to the petition in No. 85-955. "J.A." and "S.A." refer to the court of appeals appendices, copies of which have been lodged with the Clerk of this Court.

STATUTES INVOLVED

The relevant statutes are reproduced in Addendum I, *infra*, 1a-2a.

STATEMENT

Section 8(a)(1) of the Fishermen's Protective Act of 1967 (the Pelly Amendment) provides that the Secretary of Commerce shall certify to the President if the nationals of a foreign country "are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." 22 U.S.C. 1978(a)(1).[2] Upon certification, the President may, in his discretion, prohibit importation of fishery products from the certified nation. 22 U.S.C. 1978(a)(4). Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) contains a similar certification provision, directed specifically to whaling, that results in mandatory imposition of severe economic sanctions. See 16 U.S.C. 1821(e)(2).[3] Under those provisions, if the Secretary of Commerce certifies that nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the International Convention for the Regulation of Whaling (ICRW), the Secretary of State must reduce, by at least 50%, the foreign nation's fishery allocation in the United States' fishery conservation zone. 16 U.S.C. 1821(e)(2).

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[2] The Fishermen's Protective Act of 1967, 22 U.S.C. 1971 *et seq.*, is generally designed to provide compensation to fishermen whose vessels are seized by foreign nations based on jurisdictional claims not recognized by the United States.

[3] The Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, enacted in 1976, established a United States fishery conservation zone extending 200 nautical miles seaward from the United States' coast. See 16 U.S.C. 1811. The United States exercises exclusive fishery management authority within the conservation zone (16 U.S.C. 1812) and generally may allocate surplus fishery resources—which would not be used by United States fishermen—to foreign countries in accordance with various criteria in the Act (16 U.S.C. 1821).

The central issue in these consolidated cases is whether the Pelly and Packwood Amendments allow the Secretary of Commerce no discretion in determining whether to certify an ICRW party that formally objects to and departs from whale harvesting quotas. Respondents, a coalition of private wildlife organizations, contend that the Secretary must certify a foreign nation whenever its nationals exceed, in any amount and under any circumstances, a whaling harvest quota established under the ICRW. The court of appeals agreed and affirmed the issuance of a writ of mandamus ordering the Secretary to certify Japan. The order would compel the imposition of severe economic sanctions[4] on an important foreign ally, culturally and historically committed to whaling, that has entered into a formal agreement with the United States—already partially performed—to rescind its objections and effectively terminate its commercial whaling industry by April 1, 1988.

1. The International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716 *et seq.* (entered into force Nov. 10, 1948), provides the principal international mechanism for promoting the conservation and development of whale populations. The ICRW, proposed by the United States in 1946, is implemented pursuant to the Whaling Convention Act, 16 U.S.C. 916 *et seq.* It originally responded to a worldwide decline in whale harvests following World War II.[5] The ICRW was expressly intended to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." 62 Stat. 1717. Originally signed by 15 countries and designed for the benefit of whaling nations, the ICRW now has 41 signa-

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[4] The Japanese petitioners estimate that a 50% reduction in Japan's fishery allocation "would cost Japanese nationals $1.8 billion" (85-954 Pet. 12).

[5] See, *e.g.*, Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 Ecology L. Q. 323, 352-353 (1977); see generally Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law. 543 (1984).

tories, most of which have either discontinued or have never engaged in commercial whaling.[6] As the membership of non-whaling nations has grown, the ICRW increasingly has been utilized to protect whales from overexploitation.

The ICRW regulates whale harvesting practices through a Schedule which, among other matters, sets harvest limits for whale species. Art. I, 62 Stat. 1717; see 62 Stat. 1723-1727.[7] The ICRW also establishes the International Whaling Commission (IWC), a multi-national deliberative body that implements portions of the convention. Art. III, 62 Stat. 1717-1718. The IWC is composed of one commissioner from each member country, whether a whaling or a non-whaling nation (*ibid.*). The IWC, through a three-fourths' majority vote of its members, may amend the Schedule, including the harvest limits. Art. V, 62 Stat. 1718-1719. The ICRW expressly provides that a member country may file objections to IWC amendments of the Schedule (*id.* at 1719). If the country files a timely objection, it is under no obligation to comply with the amendment; however, the amendment will apply to non-objecting countries (*ibid.*).

Since the early 1970s, the IWC meetings have proven increasingly volatile and politicized as member countries have split into sharply polarized camps.[8] The whaling

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[6] The eight countries traditionally identified as commercial whaling nations are Japan, the Soviet Union, the Republic of Korea, Iceland, Norway, Peru, Chile, and Spain. Japan, which joined the ICRW in 1951, is generally recognized as the most significant of the remaining whaling countries. The United States, which was once a major commercial whaling nation, discontinued its whaling activities in 1971.

[7] The original Schedule set forth requirements for inspection of whaling operations (62 Stat. 1723), prohibitions on the taking of various whales (*id.* at 1723-1724), harvest quotas based on "blue-whale units" (*id.* at 1724), minimum size limitations (*id.* at 1724-1725), methods of factory ship operation (*id.* at 1725), and harvest reporting requirements (*id.* at 1726).

[8] Congressional staff reports, written from the non-whalers' perspective, describe the emotion and acrimony of recent sessions. See,

nations, including Japan, the Soviet Union, and Norway, have contended that the scientific evidence supports continued whaling of selected species. The non-whaling nations, including the United States, have supported stricter harvest limits and, as a conservative management measure, a general moratorium on commercial whaling.[9] Following long and fierce debates, the IWC recently reached specific decisions on two particularly controversial topics —sperm whale quotas and a general commercial whaling moratorium—that are central to the present dispute.

In 1981, the IWC, acting on the advice of its Scientific Committee, reduced the yearly harvest quota for the Western Division Stock of North Pacific sperm whales—a coastal stock harvested only by Japanese whalers—from 890 adult males to zero adult males (Pet. App. 11a, 45a-46a, 65a).[10] Soon thereafter, Japan filed a timely objection (*ibid.*). However, in 1982, prior to any Japanese whaling pursuant to this objection, the IWC provided a temporary suspension of the quota, permitting Japan to harvest 450 sperm whales in the 1982 coastal season and

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e.g., *Review of the 34th International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 3-25 (1982) [hereinafter cited as *Review of the 34th IWC Meeting*]; *Review of the 33d International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 2-15 (1981) [hereinafter cited as *Review of the 33d IWC Meeting*].

[9] As a result, the non-whaling nations generally have been successful in reducing harvest quotas. The total commercial harvest quota, covering all species, fell from 45,673 whales in 1973 to 12,371 whales in 1982. See *Review of the 34th IWC Meeting* 100.

[10] The Scientific Committee, which provides the IWC with assessments of whale populations, recommended a zero quota in 1981, based on its uncertainty concerning the population's size. See *Review of the 33d IWC Meeting* 6. The Seychelles, one of the most vocal whale conservation proponents, suggested that new scientific evidence could reopen discussion of sperm whale quotas (*ibid.*).

400 sperm whales in the 1983 coastal season.[11] In 1983, the Japanese Commissioner requested the Scientific Committee to consider whether Japan's present catch had any significant effect on the sperm whale population of the Western Division Stock. The Scientific Committee responded in 1984 that continued harvests of 400 sperm whales per year for up to five years would have only a small effect on the stock in the short term. The Committee could not reach a consensus on the potential long-term effects of that harvest level.[12] In 1984, the temporary suspension of the zero quota for the Western Division Stock lapsed by its own terms and the zero quota once again went into force. Japan continued its objection and thus retained an exemption from that quota (*id.* at 11a-12a, 46a, 65a-66a).

During this same period, the IWC also considered suggestions for whaling moratoria. In 1982, the IWC adopted a moratorium on all commercial whaling effective at the beginning of the 1985/1986 pelagic whaling season (which began in fall 1985) for high seas whaling and at the start of the 1986 coastal season (which applies to any coastal whaling commencing in 1986) for coastal whaling (Pet. App. 11a, 47a, 66a). The moratorium had long been urged by the United States as a conservative management measure in light of the lack of sufficient data to make accurate population projections for many whale stocks. The IWC has determined that the moratorium will be reconsidered by 1990, but will remain in effect

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[11] The Scientific Committee was unable to reach any consensus on the status of the population at that time. See *Review of the 34th IWC Meeting* 9.

[12] The 1984 Scientific Committee Report specifically states:

> The Committee agreed that, if continued for a short period (possibly up to five years), catches in line with the current catch limit of 400 would have only a small effect on the stock in the short term. The Committee was unable to agree on what the long term effect on the stock of such catches might be.

Report of the Scientific Committee (IWC 36/4) ¶ 10.1.1.7 (May 26, 1984). The Committee's full response to the Japanese request is set out as Addendum II, *infra*, 3a.

until changed by a three-fourths vote of IWC members. Japan, Norway, and the Soviet Union filed timely objections to the moratorium. Peru also filed an objection but later withdrew it.

In autumn 1984, the United States informed Japan that the Pelly and Packwood Amendments might be invoked in response to the sperm whaling activities of Japanese nationals. Japan, in reply, entered into discussions with the Departments of State and Commerce to reach a solution that would satisfy the concerns of both countries.[13]

On November 13, 1984, following extensive negotiations, Japan and the United States concluded an executive agreement through an exchange of letters between the Charge d'Affaires of Japan and the Secretary of Commerce (Pet. App. 102a-109a). Subject to implementation (as described in note 14, *infra*), the Government of Japan pledged to adhere to strict harvest limits and to cease commercial whaling by 1988 (Pet. App. 102a-106a). In response to this pledge, the Secretary determined, after review of IWC Scientific Committee opinions and consultation with the United States Commissioner to the IWC, that the short-term continuance of a specified level of limited whaling by Japan, coupled with its promise to phase out and discontinue all commercial whaling by 1988, would not "diminish the effectiveness" of the ICRW (*id.* at 107a-109a). Accordingly, the Secretary in-

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[13] The Soviet Union and Norway would also be potentially subject to certification if they continued their whaling after the commencement of the moratorium. However, the Soviet Union has already been certified as a consequence of its minke whaling activities and Norway does not receive fishery allocations in the United States' fishery conservation zone. See *U.S. Policy with Respect to the International Protection of Whales: Hearing and Mark-up on H.R. Con. Res. 54 Before the House Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations*, 99th Cong., 1st Sess. 53 (1985) [hereinafter cited as *1985 House Hearing*].

formed Japan that certification would not be necessary provided that Japan complied with its pledge (*ibid.*).[14]

On December 11, 1984, Japan fulfilled the first part of the agreement by withdrawing its objection to the IWC sperm whale quota, effective April 1, 1988 (Pet. App. 110a, 112a-114a). That irrevocable action will bring to an end Japanese commercial sperm whaling activities.

2. Several days before consummation of the November 13, 1984 executive agreement, respondents filed suit in the United States District Court for the District of Columbia, requesting a writ of mandamus compelling the Secretary to certify Japan.[15] The Japan Whaling Association and the Japan Fishing Association (the Japanese petitioners), trade groups representing private Japanese interests, intervened.

On March 5, 1985, the district court granted summary judgment for respondents and ordered the Secretary to

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[14] The details of the Japanese commitments were explained in a summary accompanying the letter from the Charge d'Affaires to the Secretary. First, it was agreed that if Japan would withdraw its objection to the IWC zero sperm whale quota, Japanese whalers could harvest up to 400 sperm whales in each of the 1984 and 1985 coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13, 1984, effective on April 1, 1988. This undertaking would effectively end Japanese commercial sperm whaling.

Second, the two nations agreed that if Japan would end *all* commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Under that part of the agreement, Japan would harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would restrict its harvest of other whales—under limitations acceptable to the United States, using the most recently voted IWC quota for those whales as a guideline—through the end of the 1986/87 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate all commercial whaling operations by withdrawing its objection to the IWC moratorium, on or before April 1, 1985, effective April 1, 1988.

[15] These groups later urged Congress to condemn the agreement. See *1985 House Hearing* 13. Congress took no action in response to their request.

certify Japan at once (Pet. App. 56a-86a). The district court observed that the Secretary was required to certify nations that "diminish the effectiveness" of the ICRW, but noted that neither the Pelly nor the Packwood Amendment defined that crucial phrase. The court nevertheless concluded that Congress intended the phrase to deprive the Secretary of all discretion to withhold certification whenever a country exceeds, by any amount and in any circumstances, an IWC harvest quota (*id.* at 83a-84a, 85a-86a). The district court denied the government's motion for a stay pending appeal; however, the court of appeals granted a stay on March 18, 1985 (*id.* at 87a-89a). Shortly thereafter, on April 5, 1985, the Government of Japan informed the Secretary of Commerce that Japan would perform the second condition of the agreement—withdrawal of its objection to the IWC moratorium—provided that the United States obtained reversal of the district court's order (*id.* at 116a-119a).

On August 6, 1985, a divided court of appeals upheld the district court order requiring immediate certification of Japan (Pet. App. 1a-55a). The court found that the Pelly and Packwood Amendments did not define the specific activities that would "diminish the effectiveness" of the ICRW; it therefore looked for enlightenment in the legislative history (*id.* at 22a). Based on its examination (*id.* at 22a-41a), the court concluded that the Secretary of Commerce has no discretion in determining whether to certify a nation whose whalers depart from the IWC harvest quotas. It stated (*id.* at 41a-42a):

> Where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conservation program, it has *per se* diminished the effectiveness of that program. In such a case the Secretary is mandated to certify the foreign country under the Pelly Amendment. Specifically, where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary.

The court of appeals concluded that mandamus was appropriate because "the Secretary had a nondiscretionary

duty in these circumstances to certify Japan" (*id.* at 42a).

Judge Oberdorfer, sitting by designation, dissented (Pet. App. 45a-55a). He observed that this dispute involved delicate foreign relations issues directly affecting the United States' relations with Japan (*id.* at 49a-51a). He stated that the foreign repercussions of this dispute "heighten the need for forbearance by the courts in the absence of a clear command from Congress" (*id.* at 51a). In his view, the legislative history relied upon by the court was "far from conclusive" (*id.* at 52a) and "does not so plainly alter the language of the statute as to leave the Secretary no discretion to decide whether Japan's stance *vis a vis* the [IWC] quota and the moratorium 'diminishes the effectiveness' of the Convention" (*id.* at 53a). Furthermore, he concluded that a mandamus remedy was inappropriate in light of the international relations implications and equities of the case (*id.* at 54a-55a).[16]

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States and Japan have successfully employed diplomacy to resolve the delicate issue of Japanese whaling. The resulting executive agreement—already partially performed—will lead to the effective termination of Japan's commercial whaling industry by April 1, 1988. This agreement is a salutary achievement; it has produced, *for the first time*, a binding commitment from the world's premier whaling nation to comply with a comprehensive commercial whaling moratorium. The agreement advances the worldwide interest in preserving whale populations. At the same, it recognizes that our

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[16] Petitions for rehearing and suggestions for rehearing en banc were subsequently denied. Of the circuit's nine active judges, four supported en banc review, expressing substantial agreement with Judge Oberdorfer's dissent. Three judges voted against en banc rehearing and two judges recused themselves. Thus, the en banc suggestions obtained the concurrence of a majority of the participating judges but a minority of the active judges (Pet. App. 94a-95a, 98a-99a).

ally Japan, an island nation historically and culturally tied to whaling, has firmly opposed comprehensive whaling moratoria in the past and now faces a difficult transition period in shutting down a significant domestic industry. As Japan's Charge d'Affaires noted, the agreement "avoid[s] a confrontation between our two countries" while "minimizing the economic and social hardship of those who are engaged in commercial sperm whaling" (Pet. App. 103a). The Secretary of Commerce has determined that this diplomatic compromise ultimately advances the goals of whale conservation.[17]

The court of appeals' decision repudiates this important achievement. The court errs on at least two counts. First, it mistakenly concludes that the Pelly and Packwood Amendments require the Secretary of Commerce automatically to certify any departure from International Whaling Commission harvest quotas as "per se diminish[ing] the effectiveness" (Pet. App. 41a-42a) of the International Convention for the Regulation of Whaling, regardless of the attendant circumstances. Second, it employs the extraordinary judicial remedy of mandamus in plainly inappropriate circumstances.

I. The Pelly and Packwood Amendments instruct the Secretary of Commerce to certify a foreign nation when he determines that its nationals are engaged in activities that "diminish the effectiveness" of the ICRW. The broad language of these statutes invests the Secretary with equally broad discretion—and responsibility—to determine whether specific whaling activities meet the "diminish the effectiveness" standard in any particular case. It places the decision exclusively within the informed judgment of the Secretary.

Indeed, the language is not only broad; it is also unqualified. The Pelly and Packwood Amendments do not direct the Secretary to consider any specific factors in reaching his conclusion nor do they require the Secretary to reach a particular conclusion in any specific case.

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[17] See Affidavit of Malcolm Baldrige (J.A. 107-113), reprinted as Addendum III, *infra*, 4a-9a.

Instead, they leave the determination to the informed discretion of the Executive Branch officer charged with specific responsibility for whale conservation and oceanic affairs. Under the plain language of these statutes, the Secretary is required to consider all relevant factors in determining whether a departure from an IWC harvest quota "diminishes the effectiveness" of the ICRW. His determination, which may turn on such factors as the nature, seriousness, and circumstances of the departure, can in no sense be considered a "ministerial" duty.

There is nothing unusual in this grant of discretion. Congress, recognizing the President's preeminent role in the conduct of foreign affairs and the need for flexibility in responding to international problems, traditionally delegates broad discretionary authority to the Executive Branch through the use of general terms. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-679 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936). The Pelly and Packwood Amendments, which employ a standard that relies upon an Executive Branch determination that certain activities "diminish the effectiveness" of international conventions, exhibit the familiar congressional deference to executive judgment in a matter affecting international relations.

The legislative history and background of the "diminish the effectiveness" standard confirm the Secretary's broad discretionary authority. That standard, a mainstay of the United States' international conservation programs, has been incorporated into five Acts of Congress over a period of 22 years. The legislative history of each of these Acts—the 1962 Amendments to the Tuna Conventions Act, the 1971 Pelly Amendment, the 1978 amendment of the Pelly Amendment, the 1979 Packwood Amendment, and the 1984 Eastern Pacific Tuna Licensing Act—reveals a consistent, repeated, and purposeful intention to preserve Executive Branch discretion. Congress plainly employs the "diminish the effectiveness"

standard to invoke the use of Executive Branch expertise and judgment in international conservation matters.

The legislative history is particularly persuasive on account of what it does *not* say. Nowhere in the legislative history is there an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas. Instead, the legislative history simply reflects the undisputed understanding that the Pelly and Packwood Amendments will frequently be applied in response to such departures.

Even if the plain language and legislative history were ambiguous, this Court should defer to the reasonable interpretation of the Secretary of Commerce, the Executive Branch official charged with administration of the statute. This deference is particularly appropriate in a statute dealing with international wildlife conservation, a subject that raises difficult scientific questions and delicate foreign relations issues.

The Secretary quite reasonably has interpreted the Pelly and Packwood Amendments to permit consideration of all relevant factors in the certification process. The Executive Branch must be able to apply its special knowledge of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW. The present case tellingly illustrates the reasonableness of that interpretation. The United States, through the use of diplomacy and negotiation, has convinced Japan, the premier whaling nation, to dismantle its commercial whaling industry in exchange for a short-term continuance of limited whaling. This dramatic and important success for whale conservation could not be guaranteed through a strict rule of automatic certification in response to any quota violation. The mechanical approach advocated by respondents is both dangerous and unwise; it would increase disharmony among nations and impede international conservation efforts.

Thus, we submit that the Secretary may properly conclude that a foreign nation, such as Japan, that departs

in a limited and temporary way from IWC harvest quotas, but nevertheless enters into a binding agreement with the United States to drop its objections and terminate its commercial whaling activities by April 1, 1988, has not "diminished the effectiveness" of the ICRW.

II. The court of appeals plainly erred in employing mandamus in this case. The common law writ of mandamus, as codified in 28 U.S.C. 1361, provides relief only in response to government failure to perform nondiscretionary duties. Since the Pelly and Packwood Amendments instruct the Secretary to exercise informed judgment, a plaintiff cannot compel certification through mandamus. Furthermore, even if the Secretary's certification responsibilities were ministerial, mandamus would be inappropriate in this case. It is doubtful that the Pelly and Packwood Amendments create any "duty owed to" respondents. But even if they do, the remedy remains subject to institutional and equitable considerations. In particular, this Court has made clear that "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).

It is apparent that the court of appeals' decision, if left standing, would have serious foreign relations implications. An agreement between nations—already partially performed—would, in effect, be repudiated. Japan would face severe economic sanctions and domestic dislocations. International comity would more generally be impaired since other nations would justifiably doubt the United States' ability to resolve international disputes through diplomacy and compromise, free from judicial intervention. Japan stands ready to complete its obligations under the agreement (Pet. App. 116a-119a). Repudiation of that agreement would be a grave blow to both whale conservation and international cooperation.

ARGUMENT

Congress, through the Pelly and Packwood Amendments, has instructed the Secretary of Commerce to determine and certify whether foreign nationals are conducting whaling operations that "diminish the effectiveness" of the ICRW. The principal question in these consolidated cases is whether Congress, through that general instruction, silently intended that any departure from IWC harvest quotas should completely and conclusively control the Secretary's determination.

The Japanese petitioners and the respondents take sharply contrasting positions on this issue. The Japanese petitioners, at one extreme, contend (85-955 Pet. 20-21) that the Secretary is precluded from certifying any nation that has filed a timely objection to the quota, noting that the objection excuses it from the ICRW's compliance requirements. Respondents, at the other extreme, contend (Br. in Opp. 8) that Congress intended certification "to be an automatic, mandatory and nondiscretionary sanction against any nation that intentionally allowed its nationals to violate IWC whaling quotas."

We submit that neither of these interpretations is sound. Congress vested the Secretary of Commerce with discretion to consider all relevant factors in determining whether particular whaling activity "diminishes the effectiveness" of the ICRW. The Amendments do not instruct the Secretary to reach his conclusion by looking at only one side of the ledger. The Secretary may reasonably inquire into the nature, seriousness, and circumstances of the quota departure in reaching his ultimate conclusion. Furthermore, even if the Secretary had no discretion, mandamus would be unwarranted in the present case.

I. THE PELLY AND PACKWOOD AMENDMENTS DO NOT REQUIRE AUTOMATIC CERTIFICATION IN RESPONSE TO ANY DEPARTURE FROM IWC WHALE HARVESTING QUOTAS

A careful reading of the Pelly and Packwood Amendments reveals that the Secretary exercises broad discre-

tion in determining whether particular whaling activities "diminish the effectiveness" of the ICRW. Nowhere do these statutes state that a departure from harvest quotas or, for that matter, any other particular whaling restriction, is automatically subject to "mandatory and nondiscretionary" certification. Instead, the Amendments place the certification decision squarely within the Secretary's informed judgment. The legislative history supports the plain import of the statutory language. It shows that Congress contemplated that certification decisions under the Pelly and Packwood Amendments, as well as under kindred conservation statutes, would be based upon a careful evaluation of the circumstances surrounding the particular activities in question. Even if the language and legislative history were open to dispute, this Court should defer to the Secretary's reasonable construction of the statutes that he is assigned to administer. Here, it is manifest that the Secretary has adopted a reasonable interpretation of the Pelly and Packwood Amendments.

A. The plain language of the Amendments vests the Secretary with discretion in determining whether a departure from IWC harvest quotas "diminishes the effectiveness" of the ICRW

The Pelly and Packwood Amendments each provide a three-step process for certification and sanctioning of improper whaling activities. In the case of each Amendment, the Secretary of Commerce must first determine whether foreign nationals are conducting harvesting operations that "diminish[] the effectiveness" of the ICRW. 22 U.S.C. 1978(a)(1); see 16 U.S.C. 1821(e)(2).[18] If the Secretary finds that such operations are taking place, he next "shall certify such fact." 22 U.S.C. 1978(a)(1); see 16 U.S.C. 1821(e)(2). Finally, upon formal certification, the foreign nation will be subject to

[18] The Pelly Amendment, as a general matter, applies to all " 'international fishery conservation program[s]' " including the ICRW. 22 U.S.C. 1978(h)(3). The Packwood Amendment, however, applies only to actions that affect the ICRW. See 16 U.S.C. 1821(e)(2)(A).

economic sanctions. Under the Pelly Amendment, the President may, in his discretion, restrict imports of fish products from that country. 22 U.S.C. 1978(a)(4). Under the Packwood Amendment, the Secretary of State *must* reduce that foreign nation's fishery allocation in United States waters by at least 50%. 16 U.S.C. 1821 (e)(2)(B).

Only the first step of this process—the determination whether whaling activity has "diminished the effectiveness" of the ICRW—is at issue in this case. There is no dispute that, *if* the Secretary of Commerce determines that whaling activity "diminishes the effectiveness" of the ICRW, the Secretary is obligated to certify that fact. Likewise, there is no dispute that, *if* a certification is made, the President may and the Secretary of State shall impose sanctions. This case, however, focuses on the crucial antecedent issue: whether the Secretary of Commerce *must* find that a foreign nation's departure from an IWC whale harvest quota diminishes the effectiveness of the ICRW *regardless* of other relevant countervailing factors that weigh in the balance. The plain language of the Pelly and Packwood Amendments conclusively demonstrates that the Secretary of Commerce had broad discretion to consider all relevant factors in making his determination.[19]

The Pelly and Packwood Amendments unambiguously vest the Secretary with sole authority to make the "diminish the effectiveness" determination. See 22 U.S.C. 1978(a)(1) (permitting certification "[*w*]*hen*

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[19] Respondents' arguments for "an automatic, mandatory and nondiscretionary sanction" in these circumstances (Br. in Opp. 8) rely largely on materials supporting the nondiscretionary elements of the *subsequent* steps in the certification and sanctioning process. For example, they contend (Br. in Opp. 9 & n.5) that the Secretary must certify quota departures because "[t]he statute directs that the Secretary 'shall certify' offending conduct." Likewise, they argue (Br. in Opp. 11, 14-16) that the Secretary must certify quota departures because the Packwood Amendment imposes automatic sanctions. Plainly, respondents confound the three separate steps involved in the certification and sanctioning process.

the Secretary of Commerce determines" that the standard is met); 16 U.S.C. 1821(e)(2)(A)(i) (defining certification as "*a certification made by the Secretary*"). The Secretary—not the IWC, the judiciary, or respondents—is charged with the statutory responsibility for determining whether a particular whaling activity has "diminish[ed] the effectiveness" of the ICRW. Congress, in unequivocal terms, placed that decision-making authority in the head of the Executive Branch agency with responsibility for and expertise in whale conservation matters. See 16 U.S.C. 916j.[20]

This Court has long recognized that the decision-making responsibilities entrusted to the head of an Executive Branch agency "are not mere ministerial duties." *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840).[21] The Pelly and Packwood Amendments provide no excep-

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[20] Respondents level the remarkable charge that "[i]n this case, the Secretary of Commerce substituted his judgment for the IWC's" (Br. in Opp. 18). The statutory language quite plainly provides that the Secretary, not the IWC, shall determine whether whaling activities "diminish the effectiveness" of the ICRW. Respondents' contention that the IWC should dictate when our country's economic sanctions will be imposed against our allies finds no support in the statutory language. Surely, "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974); see also *id.* at 289 n.18.

[21] This Court specifically stated (*Decatur*, 39 U.S. (14 Pet.) at 515):

> The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act.

This principle has been recognized since the formation of the Union. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). See also, *e.g.*, *United States* v. *S.A. Empressa de Viacao Aerea Rio Grandesne (Varig Airlines)*, No. 82-1349 (June 19, 1984), slip op. 13 ("'Where there is room for policy judgment and decision there is discretion.'" (quoting *Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953)).

tion. The plain language of these statutes, instructing the Secretary to determine whether particular whaling activities "diminish the effectiveness" of the ICRW, clearly invests the Secretary with broad discretion to apply his expertise and evaluate all pertinent factors in each particular case. This language, "requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary." *Decatur*, 39 U.S. (14 Pet.) at 515-516.

Indeed, the statutory language is not only broad, but also unqualified. It does not direct the Secretary to consider any specific factors in reaching his decision. It does not instruct the Secretary that he must reach a particular conclusion in any particular case. And nowhere does it state what respondents urge—that the Secretary *must* conclude that any nation that departs from IWC quotas "diminishes the effectiveness" of the ICRW. Instead, it leaves the determination to the informed discretion of the Executive Branch officer charged with special responsibility for whale conservation and oceanic affairs.[22]

Simply put, the plain language of the Pelly and Packwood Amendments conveys an express grant of discretion to determine each case on its merits. The courts cannot redefine the term "diminish the effectiveness" to rob it of its inherently discretionary content. This Court explained the controlling principle in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958), stating:

> [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See

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[22] Congress plainly knows how to restrict an Executive Branch officer's exercise of discretion when it so desires. For example, Congress stated with great specificity the manner in which economic sanctions should be applied once a certification under the Packwood Amendment has taken place. See 16 U.S.C. 1821(e)(2)(B)-(D).

> *Work* v. *Rives*, 267 U.S. 175, 183; *Wilbur* v. *Kadrie*, 281 U.S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U.S. 50, 62-63. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision.

The Pelly and Packwood Amendments, leaving to the Secretary "questions of judgment requiring close analysis and nice choices" (*ibid.*), fall squarely within this description. By their plain terms, they create no "automatic, mandatory, and nondiscretionary" obligation to conclude that a nation that departs from IWC harvest quotas has "diminished the effectiveness" of the ICRW in each and every case.[23]

This grant of discretion is hardly unusual; indeed, it is a familiar practice in statutes affecting foreign relations. Congress, recognizing the preeminent role of the President in the conduct of foreign affairs and the need for flexibility in responding to international problems, traditionally delegates broad discretionary authority to the Executive Branch through the use of general terms. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-679 (1981); *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936).

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[23] Indeed, this conclusion seems inescapable in light of the structure of the ICRW itself. The ICRW, by its own terms, does *not* require a member nation to comply with its harvest quotas, provided that the nation files a timely objection. See ICRW art. V, 62 Stat. 1719. In applying the Pelly and Packwood Amendments, we have maintained that the Secretary *may* nevertheless determine that noncompliance with non-mandatory quotas in particular cases "diminishes the effectiveness" the ICRW insofar as it imperils the ultimate goals of the convention. But it would be quite incongruous to maintain that the Secretary has a *mandatory* duty to conclude that *every* departure from *non-mandatory* quotas "diminishes the effectiveness" of the ICRW, regardless of magnitude and attendant circumstances.

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright Export Corp.*, 299 U.S. at 324.[24] The Pelly and Packwood Amendments, relying upon an Executive Branch determination that certain whaling activities "diminish the effectiveness" of international conventions, exhibit the traditional congressional deference to executive judgment in a matter affecting foreign affairs. See, *e.g.*, *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19.

Respondents nonetheless maintain (Br. in Opp. 8) that Congress intended an "automatic, mandatory, and nondiscretionary sanction," despite the inherently discretionary content of the terms Congress used. That contention "does undue violence to the words chosen by Congress." *Regan* v. *Wald*, slip op. 12. If Congress had wished to dispense with Executive Branch judgment and impose automatic sanctions, "it could easily have done so explicitly" (*id.* at 13). Congress *could* have stated that the Secretary *must* certify any country that departs in any manner from an IWC harvest quota. But Congress did not. The words it chose reflect an unambiguous intention to rely on the Secretary's considered judgment in each individual instance. That choice should be respected.

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[24] The *Curtiss-Wright* decision provides a lengthy list of examples from its era. See 299 U.S. at 324 n.2. The list has no doubt grown in the past 50 years. One need not look far for contemporary examples—the fishery allocation provisions of the the Magnuson Fishery Conservation and Management Act, codified in the same statutory section as the Packwood Amendment, provide extremely broad criteria to guide the Secretary of State's determination of foreign fishery allocations. See 16 U.S.C. 1821(e)(1)(E).

B. The legislative history demonstrates that Congress intended the Secretary to exercise discretion in determining whether a departure from IWC harvest quotas "diminishes the effectiveness" of the ICRW

The legislative history and background of the Pelly and Packwood Amendments confirm that the Secretary has broad discretionary authority to consider all relevant factors when determining whether a departure from a conservation recommendation "diminishes the effectiveness" of the conservation program. The "diminish the effectiveness" standard, a mainstay of the United States' international conservation programs, has been incorporated into five Acts of Congress over a period of 22 years. The legislative history of these Acts—ranging from the 1962 Amendments to the Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, through the Pelly and Packwood Amendments, to the Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. (Supp. II) 972 *et seq.*—reveals a consistent, repeated, and purposeful intention to preserve Executive Branch discretion in assessing whether quota departures undermine international conservation programs. Congress plainly employs the "diminish the effectiveness" standard to invoke the use of Executive Branch expertise and judgment in international conservation matters.

1. *The 1962 Amendments to the Tuna Conventions Act.* Congress first employed the "diminish the effectiveness" standard in the 1962 Amendments to the Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, which instruct the Secretary of Commerce to promulgate regulations prohibiting tuna imports from countries whose nationals conduct fishing operations "in such a manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations" proposed by the Inter-American Tropical Tuna Commission. 16 U.S.C. 955(c). The legislative history and administrative implementation of these Amendments demonstrate clearly that the "diminish the effectiveness" standard was intended to give the Executive Branch broad discretion

in determining appropriate circumstances for invoking the embargo power.

The Senate Report reveals that the 1962 Amendments were drafted and proposed by the "affected agencies of the Government," including the Department of the Interior (which, at the time, exercised authority over fisheries) and the Department of State. S. Rep. 1737, 87th Cong., 2d Sess. 1, 10-11 (1962); see also H.R. Rep. 2409, 87th Cong., 2d Sess. 3 (1962). The Senate Committee specifically requested Interior to explain how the embargo provisions would be applied. Interior answered that the regulations would respond to various activities, including a foreign nation's failure to "put into effect conservation measures applicable to its own fishermen adequate for the implementation of the Commission's recommendations" (*id.* at 7). Interior explained that the regulations would be promulgated and implemented through close cooperation with the foreign governments (*id.* at 7-8). Interior expressly stated that once it had received "adequate assurances" of cooperation:

> We would bring any evidence of failure to follow through on the assurance to the attention of the government concerned. Should that government fail to take adequate action, we would institute the certification procedure in respect of tuna offered for entry from that country.

Id. at 8. Interior's statements demonstrate a clear understanding that the "diminish the effectiveness" standard would not require automatic certification of all departures from the conservation regulations; instead, Interior would first use diplomacy and negotiation to obtain "adequate assurances" of cooperation, followed by further diplomacy to obtain "adequate action" in the event the foreign country failed to "follow through" on its assurances. The implementing regulations confirm that understanding. The regulations list a number of factors that are to be taken into account, "among such other considerations as may appear to be pertinent in a particular case," in determining whether a country will

be found to have diminished the effectiveness of a conservation program. 50 C.F.R. 281.5.[25] Those regulations, first promulgated in 1966 (see 31 Fed. Reg. 16096), demonstrate a long-standing recognition that application of the "diminish the effectiveness" standard necessarily requires exercise of Executive Branch judgment and discretion.[26]

2. *The 1971 Pelly Amendment.* The Pelly Amendment was enacted in 1971 to counteract Denmark's overfishing of Atlantic salmon. As its use of the "diminish the effectiveness" standard indicates, the Pelly Amendment was patterned after the 1962 Amendments to the Tuna Conventions Act.[27] The legislative history reveals

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[25] These factors include (50 C.F.R. 281.5):

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(6) The quantity of species * * * taken from the regulatory area by the country's vessels * * * and its relationship to (i) the total quantity permitted to be taken by the vessels of all countries participating in the fishery and (ii) the quantity of the species sought to be restored to the stock of fish pursuant to the Commission's conservation recommendations.

(7) Whether or not repeated and flagrant fishing operations in the regulatory area by the vessels of the country seriously threaten the achievement of the Commission's recommendations.

[26] Thus, the court of appeals erred in interpreting the 1962 Amendments to the Tuna Conventions Act as requiring that "[i]f a foreign country failed to implement the harvest recommendations, that failure would automatically result [in] imposition of the statutory sanctions on the foreign country" (Pet. App. 28a). Neither the legislative history nor the implementing regulations support that conclusion. Indeed, the Committee specifically stated that it expected the Secretary "to implement the conservation objectives of the Commission through cooperative international efforts." S. Rep. 1737, *supra*, at 4.

[27] See also H.R. Rep. 92-468, 92d Cong., 1st Sess. 13 (1971); *Fishery Legislation: Hearings on S. 1242, et al. Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 114 (1971) [hereinafter cited as the *1971 Senate Hearings*]; *Commercial Fisheries: Hearings on H.R. 7117, et al. Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d

that Congress (and the Executive Branch) fully expected the Pelly Amendment to produce trade sanctions in response to Denmark's flagrant violations of the salmon harvest quotas established by the International Convention for the Northwest Atlantic Fisheries (ICNAF).[28] However, the legislative history does not support respondents' contention that the Pelly Amendment requires automatic certification of *every* departure from international conservation regulations. Instead, it demonstrates that Congress intended the Secretary of Commerce to exercise informed judgment in determining whether those departures "diminish the effectiveness" of other conservation programs.

The Pelly Amendment, as originally introduced, was directed solely toward protection of New England's highly prized Atlantic salmon from Denmark's ruinous high seas fishing practices. See S. Rep. 92-582, 92d Cong., 1st Sess. 3 (1971); H.R. Rep. 92-468, 92d Cong., 1st Sess. 3 (1971).[29] The legislative history describes in

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Cong., 1st Sess. 389 (1971) [hereinafter cited as the *1971 House Hearings*].

[28] The fact that Congress and the Executive Branch intended the sanctions to be available notwithstanding Denmark's formal objection to the ICNAF's quotas (see H.R. Rep. 92-468, *supra*, at 5) refutes the Japanese petitioners' contention (85-955 Pet. 20-21) that the sanctions cannot be applied to parties that file valid objections to quotas established under international conservation treaties. Congress, in recognizing treaty rights, may nevertheless attach adverse consequences to their exercise. *Moser* v. *United States*, 341 U.S. 41 (1951).

[29] The original bill provided mandatory trade sanctions if the Secretary of Commerce determined that foreign nationals were "conducting fishing operations in a manner or in such circumstances that diminish the effectiveness of domestic conservation programs of Atlantic salmon." *1971 House Hearings* 264. However, the Commerce and State Departments urged that international, rather than domestic, conservation programs should serve as the "yardstick" for the Secretary's exercise of certification authority and that any resulting sanctions should be discretionary. See H.R. Rep. 92-468, *supra*, at 5-6. In addition, they urged that the legislation "should be applied generally to international fishery conservation programs" (*id.* at 6). Congress agreed to those modifications (*ibid.*).

detail Denmark's intransigent refusal to recognize any meaningful conservation measures.[30] The Senate and House Reports observe that Denmark "refused to agree to a total ban or even a reduction in the quota to phase out their fishing and reestablish their fishermen in other areas" (S. Rep. 92-582, *supra*, at 4; H.R. Rep. 92-468, *supra*, at 5), concluding that Denmark's position would lead to "the eventual destruction of this valuable sport fish" (*ibid.*). Congress, without question, viewed Denmark's specific actions as cause for "critical concern" (S. Rep. 92-582, *supra*, at 4; H.R. Rep. 92-468, *supra*, at 6).[31]

Congress plainly determined that Denmark's catastrophic depletion of salmon stocks in flagrant defiance of the ICNAF quotas "diminished the effectiveness" of the ICNAF conservation program, a determination in which the Executive Branch concurred. See H.R. Rep. 92-468, *supra*, at 11-15. However, that determination, resting on Congress's particular findings concerning Denmark's fishing activities, cannot support an inference that every departure from any conservation quota "diminishes the effectiveness" of the underlying fisheries conservation program.[32] Rep. Pelly himself indicated that

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[30] See *1971 Senate Hearings* 45-65, 95-99, 114-116; *1971 House Hearings* 263-396; S. Rep. 92-582, *supra*, at 3-4; H.R. Rep. 92-468, *supra*, at 4-6; 117 Cong. Rec. 34750-34754, 47053-47054 (1971).

[31] See also, *e.g.*, 117 Cong. Rec. 34751 (1971) (Rep. Dingell) (Denmark's actions are "nullifying all efforts to ensure an adequate run" of salmon); *ibid.* (Rep. Pelly) (the legislation was motivated by "the severe conservation crisis which has arisen with respect to Atlantic salmon"); *id.* at 34752 (Rep. Wylie) (Denmark's overfishing "has threatened the extinction of this natural resource which Americans spend millions of dollars each year to conserve"); *id.* at 34753 (Rep. Conte) ("[t]here is an urgent need to protect stocks of Atlantic salmon from wasteful high seas fishery."); *id.* at 34754 (Rep. Clausen) (the North Atlantic salmon is "being ravished thoughtlessly and without regard for appropriate conservation measures"); *id.* at 47054 (Sen. Stevens) (unless immediate action is taken "it will be too late to save the fish and our fishing industries").

[32] The court of appeals seems to have reasoned (Pet. App. 23a) that (1) the Danish fishing activities violated the ICNAF quotas;

not every violation would merit certification, stating (117 Cong. Rec. 34752 (1971) (emphasis added)):

> While this legislation was initially prompted by the Atlantic salmon crisis, the whaling issue and the impending over-exploitation of other living marine resources prompted me to suggest to the committee that this legislation be expanded to give the President the authority to embargo fishery products *in the case of flagrant violation* of any international fishery conservation program to which the United States has committed itself.

This was not a casual statement. Rep. Pelly specifically testified in the Senate hearings that departures from fishery conservation requirements must be sufficiently serious—as in the case of the Atlantic salmon crisis—to justify certification.[33] In accordance with Rep. Pelly's

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(2) Congress determined that the Danish activities "diminished the effectiveness" of the ICNAF conservation program; and (3) therefore, any departure from quotas must necessarily "diminish the effectiveness" of fishing conservation programs. The flaws in that syllogism are obvious.

[33] Rep. Pelly stated (*1971 Senate Hearings* 47 (emphasis added)):

> No one anticipated the advent of the Danish high seas salmon fishery, and it is entirely possible that other valuable fishery resources and marine mammals may fall victim to similar sudden intensive exploitation in the future.
>
> For this reason, H.R. 3304 was substantially amended to authorize an embargo *in the case of flagrant violation* of any international fishery conservation program to which the United States has committed itself.

Likewise, Donald L. McKernan, the State Department's Special Assistant for Fisheries and Wildlife, stated (*1971 Senate Hearings* 97 (emphasis added)):

> We do not anticipate that there would be any need to invoke the proposed legislation where conservation needs are effectively met by the agreement of all nations involved to an international conservation regime.
>
> However, there are some situations where one or more nations have failed to agree to a program otherwise agreed among the involved nations, or having once agreed, failed to abide by the agreement.

statements, the Pelly Amendment provides that the Secretary of Commerce should apply his informed judgment—through the "diminish the effectiveness" provision—to assess the particular impact of the infractions at issue in each individual case.[34]

The Pelly Amendment's legislative history is equally informative in light of what it does *not* say. Although respondents rely (Br. in Opp. 6) on "the strength of this extraordinarily pointed legislative history," they cite no passage that expressly asserts what they contend—the legislative record *nowhere* states that the Secretary has an "automatic, mandatory and nondiscretionary" duty to certify each and every foreign country whose nationals depart from fishery conservation quotas. Instead, the legislative history, like the language of the statute, indicates that the Secretary of Commerce should

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> Under the proposed legislation, *if* the action of *such* countries [i.e., countries not in compliance] *diminished the effectiveness of the international fishery conservation program*, consideration would need to be given to taking trade measures as necessary to support the conservation program.

[34] Rep. Pelly plainly recognized that his Amendment conferred substantial discretion, stating that "[t]he effectiveness of this legislation will depend upon the spirit and dedication to sound conservation of the agencies and individuals responsible for its enforcement." 117 Cong. Rec. 34752 (1971). Thus, he counseled against "inaction on the part of the Secretary of Commerce or the President," stating (*ibid.*):

> We are dealing with an aspect of foreign relations, and it is unwise to tie the hands of the Executive, but the enactment of this legislation represents a clear directive from the Congress to the President that the United States will not permit foreign countries which flount [*sic*] international conservation measures to profit through continued access to the American marketplace.

In a similar vein, Rep. Wylie, a co-sponsor of the bill, noted the important role that negotiation would continue to play under the legislation. *1971 House Hearings* 285 ("whenever any nation finds its exports to our country threatened, negotiations are advocated to promulgate conservation treaties which would be in the interest of the United States and the other nations involved").

exercise informed judgment in assessing whether these departures "diminish the effectiveness" of the particular conservation program at issue.[35]

Thus, enactment of the Pelly Amendment continued the congressional policy, initiated under the 1962 Amendments to the Tuna Conventions Act, of vesting the Secretary of Commerce with discretion to determine whether departures from international fishing quotas merit certification.[36]

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[35] Respondents and the court of appeals rely on scattered passages that, when read in context, simply indicate that the Pelly Amendment (1) *authorizes* the certification of nations that depart from international fishing quotas; and (2) would result in certification of Denmark on account of its flagrant departures from the ICNAF ban. See Br. in Opp. 8-9; Pet. App. 22a-25a. These passages do not support an inference that certification is "mandatory and nondiscretionary" (Pet. App. 42a) in every case in which a nation departs from harvest quotas.

Particularly infirm is respondents' contention (Br. in Opp. 9) that certification is mandatory because "the Pelly Amendment sanctions were created for the express purpose of penalizing nations that evaded overall limits on the catch or quotas." As this Court recently stated:

> The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. * * * Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. See, *e.g.*, *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 10-11. The Pelly Amendment's plain language expressly relies on the Secretary of Commerce's judgment to determine whether particular fishing operations "diminish the effectiveness" of a fishery conservation program. It demonstrates a purposeful intent to call upon particularized Executive Branch discretion to effectuate whale conservation goals.

[36] Notably, Denmark was never certified for its Atlantic salmon fishery. Rather, the United States reached an understanding with

3. *The 1978 Amendment of the Pelly Amendment.* If there were any doubts concerning application of the Pelly Amendment's "diminish the effectiveness" standard, they were erased by subsequent amendment of that Amendment. In 1978, Congress enlarged the scope of the Pelly Amendment as part of its extension of the Fishermen's Protective Act. The 1978 legislation authorized the Secretary of Commerce and the Secretary of the Interior to certify wildlife trafficking that "diminishes the effectiveness of any international program for endangered or threatened species." 22 U.S.C. 1978(a)(2).[37] The House Committee on Merchant Marine and Fisheries—which reported the original Pelly Amendment—specifically explained the purposes of the new provision. See H.R. Rep. 95-1029, 95th Cong., 2d Sess. 8-11 (1978). Its explanation again verifies that the Secretary of Commerce is to exercise informed judgment when applying the "diminish the effectiveness" standard.

Denmark in 1972 that called for a four-year phase-out of its high seas fishing. The substance of that understanding was eventually adopted by the ICNAF. See S.A. E1-E13. The Secretary of Commerce has invoked the Pelly Amendment on a number of other occasions when he has found that departures from IWC whale harvesting quotas have "diminished the effectiveness" of the ICRW. Respondents point to these certifications as evidence that the Secretary, in the past, *always* certified every nation that departed from international quotas (Br. in Opp. 16-18). Respondents' characterizations of the Secretary's past practice are inaccurate. In all events, the court of appeals concluded that "the record does not conclusively show what that practice has been" and that the dispute "does not present a genuine issue of material issue of fact" (Pet. App. 32a n.19).

[37] The modification added a new paragraph to the Pelly Amendment that closely mirrors the original language. It provides (22 U.S.C. 1978(a)(2)):

> When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered species, the Secretary making such finding shall certify such fact to the President

The Committee cited the past use of the Pelly Amendment to certify whaling nations that "harvested sperm, fin, and minke whales well in excess of IWC quotas," noting that the Amendment had proven to be "one of our most effective tools in the effort to conserve the world's greatest whales." H.R. Rep. 95-1029, *supra*, at 9.[38] The Committee observed that the proposed modifications could "expand the success the United States achieved in the conservation of whales to the conservation of endangered and threatened species" (*ibid.*). The Committee specifically addressed the "diminish the effectiveness" standard, stating (*id.* at 15):

> The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.[39]

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[38] The Committee implicitly recognized that the Secretary exercised a substantial amount of discretion in determining whether the taking of whales in excess of harvest quotas "diminished the effectiveness" of the international convention, stating (H.R. Rep. 95-1029, *supra*, at 9 (emphasis added)):

> In November, 1977 the Secretary of Commerce reported to the President that two non-members of the IWC—Peru and Korea—were taking whales in excess of IWC quotas. In March 1978, the Secretary of Commerce reported to the subcommittee that *although these nations are violating IWC quotas*, certification under the Pelly amendment is pending a thorough documentation and substantiation of each action that may diminish the effectiveness of the IWC conservation regime.

On December 14, 1978, the Secretary of Commerce certified Peru, Chile, and Korea "based on the fact that those countries are not members of the IWC and their nationals harvest whales substantially in excess of IWC quotas established to protect whales from overharvesting." See Letter from the Secretary of Commerce to the President (J.A. 177).

[39] Remarkably, the court of appeals dismissed this statement as irrelevant, concluding that the phrase "diminish the effectiveness"

The legislative history of the 1978 modifications to the Pelly Amendment thus reiterates the well-established congressional understanding that the Secretary of Commerce

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has a different meaning depending on whether it is applied to endangered species treaties or fishery-related treaties (Pet. App. 38a-39a). It based this distinction, which it admitted might appear "overly formalistic" (*id.* at 39a), upon a mistaken understanding of the central endangered species treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087. The court stated (Pet. App. 39a) that the Convention "operates in a manner entirely different from that of [*sic*] original Pelly Amendment." Whatever that statement means, it is clear that CITES *does* operate in a manner essentially identical to the fishing and whaling conventions. And contrary to the court's statement, CITES *does* provide for generally applicable regulations that are adopted through procedures substantially identical to those employed in the ICRW.

CITES regulates trade in endangered and threatened species through inclusion of those species in Appendix I (covering endangered species) and Appendix II (covering threatened species). CITES arts. II-IV, 27 U.S.T. at 1092-1097. Compare ICRW art. V, 62 Stat. 1718-1719 (regulating whaling through the use of a Schedule). CITES requires a two-thirds majority vote to amend an Appendix to include additional species. CITES art. XV, 27 U.S.T. at 1110-1112. Compare ICRW art. III, 62 Stat. 1717 (requiring a three-fourths majority vote to amend the Schedule). A nation may object to inclusion of a species within an Appendix; if it timely objects, it is expressly exempted from compliance with the CITES requirements governing import and export of that species. CITES art. XV, 27 U.S.T. at 1110-1112. Compare ICRW art. V, 62 Stat. 1719 (containing an analogous exemption provision). Thus, a nation that objects to the inclusion of a particular species within a CITES Appendix and then, for example, allows trade without the import and export permits required by CITES, is in the same position as a nation that objects to an IWC Schedule amendment and permits whaling in contravention of its requirements.

The court of appeals not only misunderstood CITES; it also failed to recognize that future endangered species treaties might impose specific quotas in the same manner as the ICRW. There is no indication in the legislative history that Congress intended the phrase "diminish the effectiveness" to be applied mechanically with respect to departures from fishing quotas, but to be applied flexibly with respect to departures from endangered species quotas. It strains credulity to believe that Congress intended to single phrase to have such significantly different meanings in two adjoining para-

(and the Secretary of the Interior) must be free to exercise informed judgment in applying the "diminish the effectiveness" standard. Plainly, this legislation, like the 1962 Amendments to the Tuna Conventions Act and the original 1971 Pelly Amendment, does not contemplate the mechanical rule that respondents now urge.

4. *The 1979 Packwood Amendment.* One year later, Congress enacted the Packwood Amendment, once again employing the "diminish the effectiveness" standard in a statute addressing an international conservation program. The Packwood Amendment provides that the Secretary of State must impose a severe economic sanction—a reduction, by at least 50%, of the foreign nation's fishery allocation in the United States fishery conservation zone—against any country whose nationals conduct whaling operations in a manner that, the Secretary of Commerce determines, "diminishes the effectiveness" of the ICRW. 16 U.S.C. 1821(e)(2). The legislative history of the Packwood Amendment, although rather limited, once again demonstrates that Congress intended the Secretary of Commerce to exercise informed judgment in applying that standard.

The Packwood Amendment was introduced on the Senate floor; thus, it did not receive explication in a legislative report.[40] The debates were relatively short. Sen.

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graphs of the same statutory subsection. See, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 84-648 (July 1, 1985), slip op. 9; *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983).

[40] Sen. Packwood originally proposed legislation providing that no permit to fish in the conservation zone "may be issued to any vessel of any nation certified by the Secretary of Commerce under the provisions of [the Pelly Amendment]." S. 917, 96th Cong., 1st Sess. § 3 (1979); see S. Rep. 96-72, 96th Cong., 1st Sess. 6 (1979); 125 Cong. Rec. 8951 (1979). The Senate adopted that proposal (*id.* at 8952); however, it was deleted in the House bill (*id.* at 16432). The House Committee on Merchant Marine and Fisheries—which one year before had drafted the modification to the Pelly Amendment—and the Senate Committee on Commerce, Science and Transportation later concurred in a compromise bill, agreeing "to retain, but rewrite, the Packwood Amendment" in the form that was ulti-

Packwood described the purpose of the legislation as follows (125 Cong. Rec. 21742 (1979)):

> The core of the [Packwood Amendment] is simply that any foreign country which directly or indirectly conducts whaling operations or allows its nationals to conduct whaling operations or engage in trade in whale products in disregard of the conservation regulations of the International Whaling Commission shall be denied access to the rich fishery resources of our 200-mile zone.

This statement, as well as other floor comments, indicates the sponsors' general intent to put additional "economic teeth into our whale conservation efforts" (*ibid.*).

Congress plainly intended the Packwood Amendment to retain the same "diminish the effectiveness" standard utilized in the Pelly Amendment. Congress used the same language in both amendments; furthermore, the Packwood Amendment expressly refers to the Pelly Amendment's certification procedures. See 16 U.S.C. 1821(e)(2)(A)(i). As Rep. Breaux explained, the Packwood Amendment simply provides "a new sanction for the Secretary of State to utilize once a nation is certified as diminishing the effectiveness of the International Whaling Convention." 125 Cong. Rec. 22083 (1979).[41] Thus, in light of our foregoing discussion of the Pelly Amendment and related statutes, it naturally follows that Congress

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mately passed (*id.* at 22082) (Rep. Murphy). Thus, there was no need for a conference report (*ibid.*). Although the Amendment bears Sen. Packwood's name, Rep. Murphy apparently was the author of the compromise language (*id.* at 22082-22083).

[41] Other floor statements confirm that the Packwood Amendment did not alter the Secretary's certification discretion. See 125 Cong. Rec. 21743 (1979) (Sen. Magnuson) ("This amendment is a significant addition to the sanctions presently available under the Pelly Amendment."); *id.* at 22083 (Rep. Oberstar) ("[T]his authorization links the FCMA to certification under the Pelly Amendment."); *id.* at 22084 (Rep. Oberstar) ("In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification."). The court of appeals agreed that the same certification standards apply under both amendments (Pet. App. 18a-21a).

intended to continue reliance on the Secretary's informed judgment to determine whether nations that depart from IWC harvest quotas should be certified.

Respondents nonetheless urge that the Secretary is required to certify automatically every departure from any IWC quota, asserting that "Congress intended reduced fishing rights in the U.S. Fishery Conservation Zone to be an automatic, mandatory and nondiscretionary sanction against any nation that intentionally allowed its nationals to violate IWC whaling quotas" (Br. in Opp. 8). However, respondents have produced no express authoritative statements of legislative intent to support that contention. Instead, they rely on a "common understanding" drawn from general statements in the floor debates, failing to distinguish between the inherently discretionary certification standard and the mandatory penalty that follows certification (*id.* at 10-11, 14-16).[42]

The floor debates contain a number of general statements—like that of Senator Packwood, quoted above—suggesting that the Packwood Amendment would provide new sanctions against foreign nations that "disregard," act "contrary to," or "violate" the ICRW and the resulting IWC regulations.[43] Congress plainly expected—quite

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[42] Respondents argue (Br. in Opp. 11) that "Congress did not mean to import by the back door into [the Packwood Amendment] certification the very same discretion it intended to remove when it tightened up Pelly's sanctions provision." However, Congress could reasonably conclude that the Secretary should continue to have broad discretion in determining whether whaling operations "diminish the effectiveness" of the ICRW, but further conclude that once the Secretary makes that determination, sanctions must be imposed. Indeed, Congress did just that. See note 46, *infra*.

[43] See 125 Cong. Rec. 21743 (1979) (Sen. Packwood) (the legislation "will prohibit those nations which violate the conservation regulations * * * from fishing within our 200-mile zone"); *ibid.* (Sen. Magnuson) ("if a foreign country is certified by the Secretary of Commerce for violating or diminishing the effectiveness of international whaling regulations * * * then that nation will be denied access to fish in our 200-mile fishery conservation zone"); *id.* at 22082-22083 (Rep. Murphy) ("any nation which the Secretary of Commerce has certified as being in violation of the IWC" will be

rightly in our view—that the Amendment would provide invaluable aid in "end[ing] the unnecessary and reckless violations of that agreement, and the irresponsible destruction of whales." 125 Cong. Rec. 22083 (1979) (Rep. Oberstar).[44] However, these broad aspirational statements, addressed to the undisputed general purpose of the legislation, do not shed light on the specific question at issue in this case. *None* of these statements purports to define the "diminish the effectiveness" standard. *None* of these statements expressly proclaims that the Secretary has an "automatic, mandatory, and nondiscretionary" duty to certify every violation of an IWC harvest quota. Instead, these statements simply demonstrate congressional agreement that departures from IWC regulations will—*as a general matter*—justify certification. They do not restrict the discretionary import of the "diminish the effectiveness" standard.[45]

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subject to sanction); *id.* at 22083 (Rep. Oberstar) ("the United States intends to enforce the [ICRW] and to end the unnecessary and reckless violations of that agreement"); *ibid.* (the Secretary of Commerce certifies a nation "found to have acted in a manner contrary to international agreements").

[44] Congress was particularly concerned by the emergence of "outlaw whaling"—whaling conducted by pirate ships that operate completely outside the ICRW regime. These ships paid no attention whatsoever to conservation regulations adopted by the IWC. See *Outlaw Whaling: Hearing on Whaling Operations Conducted Outside the Control of the International Whaling Commission Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. (1979).

[45] As we have previously observed (note 35, *supra*), broad statements directed to the general purposes of the statute cannot alter plain language. Likewise, they cannot define the content of particular statutory terms. This Court explained that principle in *Regan* v. *Wald*, No. 83-436 (June 28, 1984), stating (slip op. 14):

> Oral testimony of witnesses and Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies * * * would open the door to the inadvertent, or perhaps even

Indeed, the only floor statement specifically directed to application of the certification standard *supports* the Secretary's exercise of discretion. Rep. Breaux—who, as chairman of the House subcommittee that had primary responsibility for the legislation, necessarily understood the operation of the certification process—emphasized the discretionary content of the certification standard, stating, "I trust that the Secretary of Commerce will be especially careful to examine all the facts surrounding a possible certification if this law is enacted since a certification from this point on can have disastrous effects on our U.S. fishing industry." 125 Cong. Rec. 22083 (1979) (referring to possible retaliatory embargos against United States fish exports).[46]

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planned, undermining of the language actually voted on by Congress and signed into law by the President.

The floor statements in this case fall far short of the necessary direction and precision to alter the meaning of a familiar statutory term. Furthermore, President Carter, in signing the Packwood Amendment into law, plainly recognized that certification would require the exercise of judgment, stating:

> With regard to both the Packwood[] and Pelly amendments, the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation.

2 Public Papers of the President 1435 (1979) (Administration of Jimmy Carter). Finally, we note that the Packwood Amendment's language was the product of compromise (see 125 Cong. Rec. 22082-22083 (1979)); hence, this Court should be chary of relying on the statements of individual congressmen, in lieu of the statutory language, to determine congressional intent. See *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. See also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982).

[46] Rep. Breaux correctly explained the discretionary nature of the certification process in subcommittee hearings concerning the Packwood Amendment, stating (emphasis added):

> I understand under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration.
>
> First, in certifying that a country is in violation of some international agreement, *and there is a lot of flexibility in that*

In sum, the Packwood Amendment, like the three Acts of Congress that preceded it, plainly contemplated that

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> *certification* and, second, after a nation is certified, there is still discretion in determining whether a ban on imports of that country's products will be in fact imposed against that country. Therefore, under Pelly we have two discretionary features, whereas in the Packwood amendment, *you are really taking all of the discretionary features and putting them into their first category which is the certification of a nation being in violation of an international agreement.*

Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 314-315 (1979) [hereinafter cited as the *June 26, 1979 House Hearings*]. Respondents mistakenly suggest (Br. in Opp. 11-12) that Rep. Breaux had a contrary understanding of the Pelly Amendment, relying on his statements nearly one month earlier in oversight hearings on whaling. *Fish and Wildlife Miscellaneous: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. Pt. 1 (1979) [hereinafter cited as the *June 4, 1979 House Hearings*]. Plainly, Rep. Breaux's later statements, based on a more thorough examination of the statutes and directed specifically to the Packwood Amendment, give a better picture of his understanding. In all events, his statements in both hearings are consistent. In the June 4, 1979 Hearings, Rep. Breaux asked Richard Frank, Administrator of the National Oceanic and Atmospheric Administration, if the Pelly Amendment would apply to certain whaling activities. Mr. Frank responded in part (*id.* at 312 (emphasis added)):

> If a country were violating something in the schedule, for example, taking more whales than the schedule provides, *and that were a significant violation*, I believe it is clear that the Pelly Amendment would apply.

Rep. Breaux later summarized Mr. Frank's testimony to other witnesses as follows (*id.* at 359):

> Apparently Dick Frank is saying that the taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify that nation as being in violation of the taking provision. Then you get into two other categories, not supplying enough data and the importation of whale meat. They say they have some problems certifying that as a violation.

Thus, Rep. Breaux's summary statement plainly referred only to takings that the Secretary considered significant.

the Secretary of Commerce would continue to apply informed judgment in exercising its certification authority.

5. *The 1984 Pacific Tuna Licensing Act.* The passage of the Packwood Amendment did not mark the last time that Congress conferred Executive Branch discretion through the "diminish the effectiveness" standard. Just two years ago, Congress employed this standard in the Eastern Pacific Tuna Licensing Act of 1984 (EPTLA), 16 U.S.C. (Supp. II) 972 *et seq.*, to govern whether American fishing boats, seized by foreign nations for violation of the Eastern Pacific Ocean Tuna Fishing Agreement, are entitled to compensation under the Fishermen's Protective Act of 1967, 22 U.S.C. 1971 *et seq.* The legislative history of the EPTLA reveals that Congress has once again used the "diminish the effectiveness" standard to authorize the exercise of informed judgment.

The Eastern Pacific Ocean Tuna Fishing Agreement provides "an international licensing arrangement for tuna fishing in a broad area of the eastern Pacific Ocean," that also permits "conservation measures under specified circumstances." S. Exec. Rep. 98-13, 98th Cong., 1st Sess. 1 (1983). See S. Treaty Doc. 98-3, 98th Cong., 1st Sess. 3 (1983). The EPTLA, in implementing the Agreement, specifies that U.S. vessels lawfully seized by a member country for a violation of the agreement or accompanying regulations are ineligible for compensation under the Fishermen's Protective Act unless the Secretary of State determines that the violation "is not of such seriousness as to diminish the effectiveness of the Agreement." 16 U.S.C. (Supp. II) 972c. This provision thus ensures that the Secretary of State can exercise informed discretion in determining whether American fishermen who violate an international agreement can nevertheless receive federal benefits that would otherwise be unavailable.

This statute demonstrates, once again, a clear congressional understanding that not all departures from an international agreement necessarily "diminish" its "effectiveness." Furthermore, it again corroborates that Congress has employed the "diminish the effectiveness" standard in this field as a term of art, authorizing the Execu-

tive Branch to exercise informed judgment that will take into account the nature and seriousness of the particular conduct in question.[47] Concomitantly, this statute, while enacted after the Pelly and Packwood Amendments, provides yet another illustration of the inherently discretionary content of the "diminish the effectiveness" standard.[48]

Thus, the legislative history of the "diminish the effectiveness" standard, from its genesis in the 1962 Amendments to the Tuna Conventions Act, to its most recent use in the EPTLA, demonstrates a consistent congressional understanding that the standard provides the Executive Branch with broad discretion—and, indeed, the important responsibility—to evaluate the nature, seriousness, and circumstances of departures from international conservation programs. The legislative history nowhere contains an express authoritative pronounce-

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[47] This legislation was reported by the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce, Science, and Transportation, the same committees that considered the Pelly and Packwood Amendments. The House Report specifically recognized the Secretary's broad discretion, stating:

> It is the Committee's view that while failure of a seized vessel to have a license must be considered an action which diminishes the effectiveness of the [Agreement] the seriousness of a violation of a conservation regulation would need to be determined by the Secretary.

H.R. Rep. 98-721, 98th Cong., 2d Sess. 5 (1984). Notably, the Committee suggested that only a direct violation of the licensing provisions—which are specified *by the Agreement itself* (art. IV, *reprinted in* S. Treaty Doc. 98-3, *supra*, at 3)—would, of necessity, "diminish the effectiveness" of the Agreement. The Committee indicated that violations of conservation regulations—which, like the IWC harvest quotas, are promulgated by agreement of an implementing commission (art. III, *reprinted in* S. Treaty Doc. 98-3, *supra*, at 2-3)—would be left to the Secretary's discretion.

[48] See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983) ("the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat greater caution and deliberation, to seek consistency in the interpretation of an area of law at any given time").

ment that the Secretary has an "automatic, mandatory, and nondiscretionary" duty to certify all departures from IWC whale harvesting quotas. To the contrary, it obviously contemplates that negotiation and diplomacy will not be wholly displaced by a regime of automatic sanctions.

C. Even if the plain language and legislative history were open to debate, this Court should defer to the Secretary's reasonable interpretation of the statutes

It is our position that the plain language of the Pelly and Packwood Amendments, supplemented by the legislative history, conclusively establishes that the Secretary may exercise informed judgment in determining whether a departure from an IWC whale harvest quota "diminishes the effectiveness" of the ICRW. But even if there were any doubt, the Secretary's reasonable construction of these statutes should control.

This Court has repeatedly admonished:

> If * * * Congress has not addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative determination. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. *NDRC*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnote omitted).[49] The foregoing discussion demonstrates at the very minimum that Congress did not have a clear and specific intent that the Secretary must certify every departure from IWC quotas.

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[49] See also, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9 ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."); *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9 (The "view of the agency charged with administering the statute is entitled to considerable deference * * *.").

The Secretary's construction of the Pelly and Packwood Amendments should therefore be accepted because it plainly represents a "reasonable interpretation" (*id.* at 6) of the statutory scheme that he is charged to administer.

Indeed, this principle has special force when the statute is directed to the conduct of foreign affairs and therefore intersects with an area where Executive discretion and authority are at their zenith under the constitutional scheme. See *Curtiss-Wright Export Corp.*, 299 U.S. at 319. Few international problems are susceptible to neat and simple solutions, and the international conservation of whales is no exception. The conservation efforts frequently involve difficult scientific issues, projections of incomplete empirical data, and delicate cross-cultural controversies. These complexities can only be addressed through the exercise of informed judgment and careful discretion; they cannot be resolved through blind adherence to mechanical formulae. As already discussed, the Pelly and Packwood Amendments, by their plain terms and their legislative history, require informed exercise of the discretion necessary to address these difficult challenges. The Secretary of Commerce quite reasonably interprets those statutes to permit consideration of all relevant factors in the certification decision.

The present case persuasively illustrates the reasonableness of the Secretary's interpretation. The United States, through concerted efforts over the past decade, has convinced the IWC to reduce whale harvest quotas and, ultimately, to adopt a worldwide moratorium on commercial whaling. These achievements are of little moment, however, absent compliance by Japan, the world's foremost whaling nation. Japan, an island country historically and culturally committed to whaling, lodged an objection to the IWC resolutions and thereby exempted itself, under the express terms of the ICRW, from compliance. The United States, through extensive diplomatic efforts, nonetheless convinced that country to accept the moratorium and dismantle its commercial

whaling industry in exchange for a transition period of limited additional whaling.

This executive agreement, viewed from any reasonable perspective, represents a dramatic success. As Japan's Charge d'Affaires stated (Pet. App. 103a), the agreement "avoid[s] a confrontation between our two countries" while "minimizing the economic and social hardship of those who are engaged in commercial sperm whaling." But more importantly for purposes of the Pelly and Packwood Amendments, the agreement furthers the ultimate goals of whale conservation. The agreement, *for the first time*, achieves a voluntary pledge from the world's premier whaling nation, to dismantle its commercial whaling industry in exchange for a short-term continuance of limited whaling. The Secretary of Commerce quite rightly concluded that this result does not "diminish the effectiveness" of the ICRW.[50]

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[50] That conclusion is difficult to dispute. As the Secretary explained:

> Japan is by far the most significant of the few remaining whaling nations. Not only do Japanese whalers account for the largest share of all whales harvested on a global basis, but Japan provides the export market for many of the whales harvested by nationals of other countries, including the Soviet Union. I believe that a cessation of all Japanese commercial whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development.

Affidavit of Malcolm Baldrige, Addendum III, *infra*, 6a-7a (J.A. 110). Japan's temporary and limited continuance of commercial whaling is a prudent price to pay in exchange. The Secretary, upon review of the IWC Scientific Committee reports and consultation with the United States Whaling Commissioner, reasonably concluded that, even allowing for the possibility of substantial error in whale population estimates, Japan's limited short-term whale harvests would not pose a significant threat to the affected species. Affidavit of Malcolm Baldrige, Addendum III, *infra*, 4a-9a (J.A. 107-113). The Department of Commerce reports that there are presently 982,200 sperm whales worldwide, and approximately 198,000 sperm whales in the North Pacific Western Division Stock. See U.S. Dep't of Commerce, *Annual Report 1984/85: Marine Mammal Protection Act of 1972* at App. Table 11 (June

Respondents, of course, disagree. They posit a simplistic and dangerous foreign policy, arguing (Br. in Opp. 18) that the Secretary of Commerce cannot "substitute his judgment for the IWC's." They maintain that the United States, armed with the Pelly and Packwood Amendments, is obligated to forswear diplomacy and immediately certify any departure from IWC harvest quotas. Respondents seemingly are confident that if the United States swings its cudgel, Japan will unconditionally submit.[51]

This naive approach to foreign affairs, advanced by politically unaccountable entities, is facially infirm. And even if it were tenable, it does not reflect congressional policy or diminish the reasonableness of the Secretary's position. The Secretary determined, based upon his expert knowledge of the United States' international conservation efforts and his direct dealings with Japan, that the executive agreement provides the best method for advancing the goals of the ICRW. This Court should defer to the reasonable views of the Executive Branch, "the Nation's organ for foreign affairs." *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). See also, *e.g.*, *Haig* v. *Agee*, 453 U.S. at 291; *Curtiss-Wright Export Corp.*, 299 U.S. at 307, 319.

Our whale conservation efforts require the type of international diplomacy applied in this case. The Executive Branch must be able to apply its special knowledge

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1985). The Department also reports that there are approximately 315,800 minke whales and 30,200 Bryde's whales worldwide (*ibid.*).

[51] In testimony before Congress, respondents expressed their views in particularly belligerent terms. They characterized the executive agreement as a "craven act" and a "sell-out," charging that the United States "capitulated" to Japanese "bullying." *1985 Hearings* 13 (testimony of Craig Van Note, Executive Vice President of Monitor, Inc.). They urged that Japan could not be trusted (*id.* at 14, 17-19) and warned that the "bilateral deal with Japan has opened a Pandora's box by demonstrating weakness" (*id.* at 21). They confidently stated that "Japan practices bluff and bluster in its dealings with other nations, but it can ill-afford a trade war with the United States" (*id.* at 15).

of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW. A strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts. Additionally, it may result in certification of countries that depart from IWC requirements that the United States itself considers unreasonable.[52] Indeed, respondents' position might also cast a shadow over application of the Pelly Amendment to other international conservation programs, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 2, 1973, 27 U.S.T. 1087.[53] Their position would seemingly require certification of foreign countries in every instance in which they permit endangered species trade proscribed by CITES, regardless of the impact of

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[52] For example, the United States, in the face of foreign objections, has long supported the right of Alaskan and Greenland natives to take each year—for subsistence purposes—a limited number of the world's most endangered whale species, including the bowhead whale, which numbers approximately 3,800 animals. See U.S. Dep't of Commerce, *Annual Report 1984/85: Marine Mammal Protection Act of 1972*, at 28-29 & App. Table 11 (June 1985). See also *Adams* v. *Vance*, 570 F.2d 950 (D.C. Cir. 1978). If the IWC voted to prohibit all aboriginal subsistence whaling of these species, both Alaskan and Greenland natives would be affected. The United States and Denmark (on behalf of Greenland) might conceivably enter objections if they concluded that the prohibition was unnecessary. Under the court of appeals' construction, the United States would be required to certify Denmark even as it permitted its own natives to continue their traditional activity.

[53] CITES represents a broad conservation effort, supported by 82 signatory nations, controlling international trade in more than 1,000 species from marine, freshwater, and terrestrial environments. As previously noted (see note 39, *supra*), a nation that lodges a reservation to the placement of a particular species on Appendix I (endangered) or Appendix II (threatened) and permits trade in that species without the required import and export permits is in the same position as a nation that objects to an IWC amendment of the ICRW Schedule and permits whaling in contravention of it.

that trade on the species or on the effectiveness of the treaty.[54]

Thus, we submit that the plain language and legislative history of the Pelly and Packwood Amendments, which fully support the Secretary's interpretation, are fortified still further by established principles of judicial deference. The Secretary may properly conclude that a foreign nation that departs in a limited way from IWC harvest quotas, but nevertheless enters into a binding agreement with the United States to drop its objections and terminate its commercial whaling activities by April 1, 1988, has not "diminished the effectiveness" of the ICRW.

II. THE COURT'S USE OF MANDAMUS WAS INAPPROPRIATE IN THIS CASE

The court of appeals, concluding (Pet. App. 42a) that the Secretary of Commerce has "a mandatory and nondiscretionary" duty under the Pelly and Packwood Amendments to certify Japan, affirmed the district court's issuance of a writ of mandamus. See 28 U.S.C. 1361.[55] Because the Secretary's obligations are discretionary, mandamus is plainly inappropriate. Furthermore, even

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[54] We suspect that few nations—whether importers or exporters of wildlife—have CITES records so unblemished that they are free from the possibility of sanctions under an automatic certification requirement. Certainly, Congress did not intend the Executive Branch to wage economic warfare upon the world community, imposing in terrorem sanctions against every CITES transgression, regardless of circumstances. Respondents downplay this problem, noting (Br. in Opp. 14 n.8) that the Pelly Amendment permits the President to withhold sanctions. But it is obviously unsound to suggest in this area of great sensitivity that there is no harm in treating discretionary duties as mandatory, because the exercise of other forms of discretion can cure any untoward consequences. Moreover, certification of all CITES violations, both great and small, would remove practical as well as symbolic significance from the certification process.

[55] Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency to perform a duty owed to the plaintiff.

if the Secretary did have a nondiscretionary duty to certify Japan, mandamus would be inappropriate in this case.[56]

"The common law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 13.[57] Since the Pelly and Packwood Amendments instruct the Secretary of Commerce to exercise informed judgment, a plaintiff cannot compel certification through mandamus.

But even if the Secretary's duty were nondiscretionary, mandamus would still be inappropriate in this case. First, it is highly doubtful that the Pelly and Packwood Amendments create any "duty owed to" respondents. 28 U.S.C. 1361.[58] And even if they do, mandamus neverthe-

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[56] Since the district court lacked jurisdiction under the mandamus statute, there is no need for this Court to address the constitutional issues of justiciability raised in Judge Oberdorfer's dissent (Pet. App. 49a-52a).

[57] See, *e.g.*, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-544 (1937); *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218-221 (1930); *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515-516 (1840). Respondents state (Br. in Opp. 20) that "the justiciability of the execution by the Executive Branch of the laws of the United States has been beyond question since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)." However, *Marbury* itself states that where "the heads of departments * * * act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more clear than that their acts are only politically examinable." 5 U.S. (1 Cranch) at 166.

[58] The Pelly and Packwood Amendments authorize the Executive Branch to take certain actions in response to the international activities of foreign nationals. They do not create governmental duties owed to any particular domestic plaintiff. Furthermore, respondents do not have any readily identifiable legal interest in the subject matter of this suit—free-roaming whales that inhabit international waters. There is no basis for concluding that Congress intended the mandamus statute to create a mechanism for any one of the thousands of persons interested in the long-term well-being of whales to compel severe economic sanctions against foreign governments. Cf. *Federal Election Comm'n* v. *National*

less remains a remedy that "is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 373 (1955). This Court recently emphasized that courts exercising their equitable powers "should pay particular regard for the public consequences in employing [an] extraordinary remedy." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). See also *Sampson* v. *Murray*, 415 U.S. 61, 83-84 (1974). As Judge Oberdorfer's dissent explains (Pet. App. 55a), the institutional and equitable considerations surrounding Executive Branch judgment in foreign affairs offer strong counsel against the use of mandamus in this case.

In particular, this Court has repeatedly stated that "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, slip op. 19 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). The Court has explained this "classical deference" (*Wald*, slip op. 19) as follows:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate and complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which have long been held to belong in the domain of political power not subject to judicial inquiry or intrusion.

Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. at 111.[59]

Conservative Political Action Committee, No. 83-1032 (Mar. 18, 1985), slip op. 6-7.

[59] See, *e.g.*, *Haig* v. *Agee*, 453 U.S. at 291; *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 310 (1963); *Johnson*

In the present case, judicial intervention through mandamus would result in imposition of severe economic sanctions against Japan, an important ally and trading partner, without any firm assurances that the sanctions will advance the cause of whale conservation. Japan may cease whaling; on the other hand, it may decide to cease its cooperation with non-whaling nations, completely ignore the IWC quotas, and perhaps even take retaliatory trade actions of its own. The Executive Branch is best situated to deal with this delicate matter.

Furthermore, a mandamus order requiring certification would effectively amount to judicial repudiation of a solemn agreement between nations—already partially performed—that prevents a confrontation among allies, that rests upon a wholly reasonable construction of the Pelly and Packwood Amendments, and that advances the underlying purposes of those statutes. Japan could conceivably charge that repudiation of that agreement violates international law.[60] This Court should hesitate to

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v. *Eisentrager*, 339 U.S. 763, 789 (1950); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918).

[60] Japan might claim that the United States should be bound by its agreement regardless of a subsequent judicial determination that the agreement is inconsistent with domestic law. For example, Article 46 of the Vienna Convention on the Law of Treaties provides:

> 1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.

See S. Exec. L, 92d Cong., 1st Sess. 24 (1971). The United States has not ratified this Convention. However, the State Department stated in 1971 that the Convention is generally recognized as the authoritative guide to current treaty law and practice (*id.* at 1). See generally Restatement (Revised) of Foreign Relations Law of the United States Pt. III (Tent. Draft No. 1 1980).

take actions that might ultimately precipitate international legal disputes. See, *e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963).

Finally we note that the use of mandamus in this context could have repercussions beyond the realm of wildlife conservation. Congress has adopted other measures that authorize sanctions against foreign nations based on Executive Branch application of generally phrased standards.[61] Similar judicial intervention under those statutes, compelling the Executive Branch to take foreign relations actions based on finespun judicial definitions of "mandatory and nondiscretionary" duties, would inevitably inject the Judicial Branch into the conduct of foreign policy—an area traditionally entrusted to the President and Congress. Foreign nations would justifiably doubt the United States' ability to resolve international disputes through diplomacy and compromise, free from judicial intervention.

In sum, the Secretary plainly acted within his authority in refusing to certify Japan under the Pelly and Packwood Amendments. Judicial rejection of that decision, and the consequent repudiation of a resulting executive agreement between the United States and Japan, would be a grave blow to both whale conservation and international cooperation.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[61] See, *e.g.*, 22 U.S.C. 2151n (providing for the cessation of aid to governments that engage in "gross violations of internationally recognized human rights").

Respectfully submitted.

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FEBRUARY 1986

ADDENDUM I

STATUTES INVOLVED

1. Section 8(a) of the Fishermen's Protective Act of 1967 (the Pelly Amendment) provides in relevant part (22 U.S.C. 1978(a)):

> (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.
>
> * * * * *
>
> (4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) * * * from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) provides in relevant part (16 U.S.C. 1821(e)(2)):

> (A) For the purposes of this paragraph—
>
> (i) The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 1978(a) of title 22.
>
> (ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) that—

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period; shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

ADDENDUM II

Report of the Scientific Committee
International Whaling Commission
IWC/36/4 1984

* * * * *

10.1.1.7 Japanese Commissioner's request

At the last Commission meeting, the Japanese Commissioner had requested that the Committee consider whether the present size of catch from [the North Pacific Western Division sperm whale stock] had any significant effect on the population.

Although it had been unable to recommend a classification or catch limit for this stock, the Committee agreed that the evidence on the likely range of current stock levels discussed above was sufficient for it to provide advice on this matter.

The Committee agreed that, if continued for a short period (possibly up to 5 years), catches in line with the current catch limit of 400 would have only a small effect on the stock in the short term. The Committee was unable to agree on what the long term effect on the stock of such catches might be.

Should catching at the current level continue for a longer period, the Committee agreed that neither the short nor long term effects on the stock could be predicted on the basis of current information. To provide advice in this case, the Committee agreed that more reliable estimates of current stock size and the biological state of the stock were essential, as well as continuous stock monitoring.

An important first step along these lines was agreed to be a comprehensive sightings survey in the western North Pacific stock area. This could be carried out as an [International Decade for Cetacean Research] program.

* * * * *

ADDENDUM III

Affidavit of Malcolm Baldrige

January 14, 1985

(J.A. 107-113)

I, Malcolm Baldrige, first having been sworn, state as follows:

1. I am the Secretary of Commerce of the United States. As such, I am the Federal official responsible for "certifying" certain facts pursuant to the Pelly Amendment to the Fishermen's Protective Act and the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act.

2. I am aware of the issues involved in this litigation and was involved in the exchange of letters referred to in the First Amended Complaint. Throughout the development of the text of those letters and the related Summary of Discussions between Dr. John V. Byrne, United States Commissioner to the International Whaling Commission, and Mr. Hiroya Sano, Director General of the Fisheries Agency of Japan, I was advised daily by Dr. Byrne of the progress of the negotiations, and I met once with Mr. Sano. In my judgment, the exchange of letters reflects the best way to achieve Japanese compliance with the Schedule to the International Convention for the Regulation of Whaling 1946 (the Convention), particularly paragraph 10(e) of the Schedule, which provides for a cessation of all commercial whaling beginning with the 1985/86 pelagic season and with the 1986 coastal whaling season.

3. As stated in my letter of November 13, 1984, to Mr. Yasushi Murazumi, Charge d'Affaires ad interim of Japan, I have determined that Japanese commercial whaling consistent with Mr. Murazumi's letter to me of November 13, 1984 and with the Summary of Discussions

attached to that letter would not diminish the effectiveness of the Convention or its conservation program within the meaning of the Pelly and Packwood-Magnuson Amendments. In reaching that determination on November 13, I took into account all the relevant facts and circumstances as they then existed, including the following:

a. At its annual meeting in 1981 the International Whaling Commission ("IWC") adopted Footnote 1 to Table 3 to the Schedule, stating that no harvest was authorized from the Western Division of the North Pacific stock of sperm whales until the IWC expressly provided otherwise. As permitted by Article V, Paragraph 3 of the Convention, the Government of Japan filed a timely objection to Footnote 1 on November 9, 1981, with the legal result that Japan was not bound by the Convention to refrain from harvesting North Pacific sperm whales, and no catch limit applied under the Convention to Japanese harvests from that stock.

b. Before Japanese nationals would have taken North Pacific sperm whales under Japan's objection to Footnote 1, the IWC further amended Table 3 at its annual meeting in 1982, by adopting Footnote 2, establishing catch limits of 450 and 400 whales in the 1982 and 1983 coastal seasons, respectively. The effect of Footnote 2 lapsed by its own terms after the 1983 coastal sperm whaling season in early 1984. As of the beginning of the 1984 coastal season, therefore, Footnote 1 applied and no taking of sperm whales was authorized by the Schedule. The Japanese, however, were entitled under international law to take sperm whales without limit from this stock, pursuant to their 1981 objection.

c. At its annual meeting in Buenos Aires, Argentina in June 1984, the IWC took no action to further amend Table 3 to the schedule, and no proposed amendment was presented to or voted upon by the

Commissioners in their plenary session. However, the report of the Scientific Committee with respect to this stock indicated that further harvests for up to five years in numbers like those set forth in Footnote 2 have only a small effect on the status and trend of the stock in the short term. The Committee was unable to agree on the long term effects.

d. At its annual meeting in 1982, the IWC also adopted paragraph 10(e) of the Schedule, often referred to as the "moratorium" or "cessation". Paragraph 10(e) provides:

> "Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits."

Japan, Peru, the Soviet Union and Norway all filed timely objections to the provisions of paragraph 10(e) as adopted by the IWC in 1982. (Peru subsequently withdrew its objection.) Accordingly, as of November 1984, Japan was not bound under international law by either Footnote 1 to Table 3 or paragraph 10(e).

e. Japan is by far the most significant of the few remaining whaling nations. Not only do Japanese whalers account for the largest share of all whales harvested on a global basis, but Japan provides the export market for many of the whales harvested by nationals of other countries, including the Soviet Union. I believe that a cessation of all Japanese commercial whaling activities would contribute more to

the effectiveness of the IWC and its conservation program than any other single development.

f. Under Section 201 of the Magnuson Act, the Secretary of State may permit foreign vessels to fish in the United States' fishery conservation zone only to the extent that domestic fishermen are unable to harvest the optimum yield. The Administration's policy is to encourage the development of domestic fisheries and the export of fisheries products originating in the fishery conservation zone. To the extent this policy is effective, the total allowable level of foreign fishing referred to in section 201 of the Magnuson Act will decrease. Accordingly, the government's leverage under the Packwood-Magnuson Amendment can be expected to decrease as foreign fishermen are displaced by domestic fishermen. I therefore considered it desirable that certification under the Packwood-Magnuson Amendment, if required, occur soon.

4. Beginning on or about November 1, 1984, discussions were held between a Japanese delegation headed by Mr. Sano and a United States delegation headed by Dr. Byrne, the U.S. Commissioner to the IWC. The United States government's purpose in those negotiations was to induce Japan to withdraw its objections to Footnote 1 to Table 3 and to paragraph 10(e) of the Schedule in a manner supportive of the IWC's conservation program and the successful implementation of paragraph 10(e) in particular. The Japanese delegation, however, asserted that its instructions were limited to the question of sperm whaling from the Western Division of the North Pacific stock.

5. The result of these negotiations, which ended on or about November 13, 1984, is reflected in the exchange of letters referred to previously. In sum, the arrangement reflected in that exchange of letters permits me to (1) certify Japanese whaling inconsistent with any provision

of the Schedule to which Japan has not objected, (2) certify Japanese whaling inconsistent with the terms of the exchange of letters and (3) certify Japanese whaling in excess of any IWC quota which Japan has not agreed to comply with in the future, as evidenced by prospective withdrawal of its current objections.

6. On December 11, 1984, the Government of Japan withdrew its objection to Footnote 1, effective April 1, 1988, as contemplated by paragraph 1 of the Summary of Discussions. This action by the Japanese Government will render it bound by Footnote 1 after the 1987 coastal sperm whaling season ends in early 1988. This action alone, however, will not insulate Japan from certification under the Pelly and Packwood-Magnuson Amendments for coastal sperm whaling after the end of the 1985 coastal season. Japan would be insulated from such certification for any whaling after the effective date of paragraph 10(e) only if, on or before April 1, 1985, it withdraws its objection to paragraph 10(e) on the basis set forth in paragraph 2 of the Summary of Discussions.

7. In my view, the exchange of letters virtually assured one of two possible results: either Japan would terminate all commercial whaling no later than two seasons after paragraph 10(e) contemplates; or, Japan would fail to withdraw both of the relevant objections and be subject to certification in 1985, when sanctions under the Packwood-Magnuson Amendment would still have practical economic consequences to the Japanese fishing industry.

8. In determining whether Japanese commercial whaling in accordance with the exchange of letters would "diminish the effectiveness" of the Convention or its conservation program, I compared the situation as it existed in November 1984 with the situation as it would exist upon implementation of the exchange of letters by the Government of Japan. I concluded that the conservation program of the Convention and the long-standing policy

of the United States in support of a moratorium on all commercial whaling would be better served by the latter.

/s/ Malcolm Baldrige
Secretary of Commerce

Subscribed and sworn to before me this
14th day of January, 1985.

/s/
Notary Public, District of Columbia

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